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Recommended Citation

Hon. Jack B. Schmetterer, Abraham E. Brustein, Alan C. Hochheiser & Ronald R. Peterson, *BAPCPA: What Do We Know and When Did We Know It?*, 4 DePaul Bus. & Com. L.J. 597 (2006)

Available at: <https://via.library.depaul.edu/bclj/vol4/iss4/7>

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BAPCPA: What Do We Know and When Did We Know It?*

*Hon. Jack B. Schmetterer, Abraham E. Brustein,
Alan C. Hochheiser, & Ronald R. Peterson*

MR. PETERSON: Two years ago Professor Lawrence King, 36 hours before he died, addressed the American College of Bankruptcy, and he recounted his activities in the passage of the Reform Act of 1978.¹ He recalls how Congressman Caldwell Butler, who was the ranking republican member on the judiciary committee, came to him with his hat in hand and crying towel in the other hand and said, "Congressman Edwards, the chairman of the Judiciary Committee will not give me the time of day. Can you help me?" And Professor King said, "Yes, I will. Give me all of your amendments," of which there were about 250, "and I will put them into three buckets. Those that are purely political matters I will put in bucket A, and that's up for you and Congressman Edwards to fight out. In bucket B I will put those amendments which I think have great merit, and I will ask Congressman Edwards to give them very favorable consideration. And in the third bucket I will put those amendments which I think are nonsense, and you will promise not to tell Edwards about them."

And he went on to remark that he did that — he kept his word, and made those inputs to Congressman Edwards, and from that we had a well crafted Bankruptcy Reform Act of 1978.² What he lamented at the end of his life is that the bankruptcy community, the bench and the bar, were effectively shut out of this particular bankruptcy bill, which I refer to as BAPCRAPA.³ Not only that, but we have no legislative history of the final compromised version. But we are reassured by some young professor who told Congressman Sensenbrenner that every word is perfect. With those statements in mind, we have a bill that was drafted by people who had no idea how the bankruptcy system worked and had no idea how to draft legislatively.

* This is an edited version of the transcript from the second panel at the DePAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, *Old Code, New Code: Views on Bankruptcy from the Bench and Bar*, held on April 27, 2006.

1. Pub. L. No. 95-598, 92 Stat 2549 (1978).

2. *Id.*

3. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

With that background in mind, I will start with my good friend Judge Schmetterer, and ask him, is every word perfect, and have we discovered any unintended surprises?

HONORABLE JACK B. SCHMETTERER: We have a lot of surprises ahead of us and behind us. Of course, it's very badly and shabbily drafted. I would like to suggest that the bad drafting is an opportunity for real lawyers to have great input in the crafting of interpretation of this bill.

In Chicago, what we have so far is really minor stuff. People have motions to extend the stay, important to the people of course, but not very complex stuff; motions to dismiss for people who don't file things they are supposed to file. And, incidentally, when lawyers do that to their clients, it is my practice not to go to the new statute, but just go to 329⁴ and ask him why they should keep their fees.

Reaffirmations, where we are triggered by a notice from our clerk that somebody has less money than they need to pay a reaffirmation, so we hold a hearing. Waiver of filing fees. Really, very simple and minor stuff. We have not had aggressive lawyering in major issues in Chicago.

I call to your attention one of the items in your materials is an article by my colleague Gene Wedoff, who is a most prolific writer, very brilliant fellow. And he suggests in there, there's considerable judicial discretion to find abuse under 707(b)(3).⁵ And what he is talking about is the essential fact that the means test merely sets up a presumption of what people are able to pay and within what limits they ought to be able to pay in order to be forced into a Chapter 13 or a presumption as to whether rich deadbeats have enough to pay to be able to be forced into a 13; but that there are real opportunities for aggressive lawyering in circumstances such as he illustrates to question the presumption that the means test is correct under the statute. We do not get those types of efforts.

There are many provisions in the Code that because of bad drafting are open to interpretation. We do not get aggressive actions to seek the interpretation that somebody thinks we ought to engage in. I don't know how we are going to react to those if they come, but we don't get them.

And I want to suggest, there is great room for great lawyering, and this is an opportunity for lawyers to participate at the take-off of the new statute which needs interpretation and which you have an oppor-

4. 11 U.S.C. § 329 (2005).

5. 11 U.S.C. § 707(b)(3) (2005).

tunity to contribute to by bringing the aggressive litigation that I think some parts cry out for.

MR. BRUSTEIN: I could follow up on that. And it ties into what the program is called: "What Do We Know And When Did We Know It." Two things, Judge Schmetterer. First, I think we are still in that period that we are dealing with the cases that couldn't be filed before October 17, and that, for whatever circumstances, had to be filed afterwards. And the most immediate issues are the 363(c)⁶ issues and 521⁷ issues, and 109⁸ issues.

The other thing — but I agree because — with your analysis of what has taken here — the opportunities, because as I read a couple dozen decisions under the current statute, what I have noticed is every case involves statutory construction. What are the maxims? Everybody — the judges are finding it's not crystal clear; "I have to do something. I have to find meaning."

And you had Cathy Vance here earlier. I wasn't here for her discussion, but I know she has prepared a list of maxims and rules of statutory construction. It's in material I received in other conferences where she has participated, and I only didn't copy it because it had a copyright symbol, and I didn't know — didn't want to run into that.

But to follow up with what the judge is saying, get a hold of the 30 maxims of statutory construction or Sutherland⁹ because that's where it's going to start. It's hard to go back to and construct these arguments. What do you do with legislative history? What do you do with failure to describe something not exactly the same way in two different parts of the statute; what inferences that leads to and what is the presumption.

But I think if you can find Cathy's lists and start from there, it's a running start, because it's a daunting experience or undertaking to now have to do a statutory construction part of a brief rather than a real merits part of the brief.

MR. HOCHHEISER: One of the things that we are seeing is there are some jurisdictions where there is aggressive lawyering going on. North Carolina, Texas, Utah, and even Tennessee are coming out with cases on these issues, looking at statutory construction. And either the attorneys there are being more aggressive, the judges are more receptive to writing opinions in those jurisdictions, or the right cases are just coming before them.

6. 11 U.S.C. § 363(c) (2005).

7. 11 U.S.C. § 521 (2005).

8. 11 U.S.C. § 109 (2005).

9. NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION (6th ed. 2000).

So we are not seeing it in the Northern District of Illinois, as the judge has said. We don't see a lot of it in Ohio, where I practice, but there are jurisdictions around the country where these lawyers are being aggressive and challenging issues, and that's where we are seeing the decisions come out of, at least in the early stages.

MR. PETERSON: I think you are seeing two phenomena here. Number one, in the Northern District of Illinois, we had 62,000 filings by October 17 of 2005. Our ambient level of filing in 2004 had been 1,000 cases a week. After October 17, that dropped to 100 cases a week, with a disproportionate number of those being pro se's that were being summarily dismissed by the U.S. Trustee and the Court during January and February 2006. As a bankruptcy trustee, I was still hearing pre-BAPCRAPA¹⁰ cases right on through to St. Patrick's Day. I finally started hearing the new cases, but I probably heard 100.

The second phenomena I have observed is that the capstone of this "consumer reform," and I will put that in quotes, was this means test. But if you look at the means test, and you throw out the number of consumers who have primarily business debts, and you threw out the consumers that have primarily — are under the median income — of my first 100 cases, I had two that were above the median income, and both of them passed the means test with flying colors because of the anomalies in the law.

For example, if you own your Mercedes and finance it through Ford Motor Credit, you pass the means test. If you are dumb and lease the Mercedes, you flunk it. And so I think right now, Judge, you haven't seen enough cases — we are doing 100 cases a week right now in the Northern District. And number two, I think that the impact of the consumer side of this law has been grossly overstated, while the commercial impact, in Chapter 11's in particular, have been grossly understated.

HONORABLE JACK B. SCHMETTERER: One observation I would like to make. We all know that the statute is badly drafted, shabbily drafted, carelessly drafted. Now, having realized that, we should stop talking about that because it isn't going to change. This Congress will not touch a technical corrections act. Maybe the next Congress will, but not this one. It will be awhile before we will get somebody even to deal with cleaning up the words.

Those of you who know Congress people that you can talk to about that, you should, if you do. My Congressman won't even answer my

10. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

letters. Maybe Lou is in the same District, knows him, and can get him to answer my letters.

AUDIENCE MEMBER: I am more polite than you.

HONORABLE JACK B. SCHMETTERER: Now, we have some commercial problems, which I think Brother Peterson is going to talk to us about.

MR. PETERSON: Let me talk about a few of the changes and how some of the people have done work-arounds. One of my favorites, of course, is 503(b)(6),¹¹ which was Congress' attempt to stamp out KERPs, Key Employee Retirement Plans.

Made ever so popular by the United States Bankruptcy Court for the District of Delaware was the concept that businessmen who blundered into Chapter 11 by poor management or dishonesty deserved a reward. I can remember one Delaware case, standing up and telling Judge Walrath that my committee supported the KERP, provided the debtor's president didn't show up for work.

Congress really came down hard and passed amendments that, basically said you couldn't have a KERP unless, number one, your CEO and CFO went up and down LaSalle Street and got a better offer from somebody that wasn't in bankruptcy and, number two, that the compensation either wasn't ten times the amount that the non-managerial people were getting or 25 percent more than their present compensation.

Now, think about it for a second. If somebody gets a better offer from somebody not in bankruptcy on LaSalle Street, why is he working for the debtor? Most people who looked at this concluded that KERPs were dead, that we weren't going to see any more. The term KERP is not defined in the Bankruptcy Code. And there's been some recent decisions by Judge Walrath who, basically said take the word "retention" out of the plan and call it an incentive plan, and we will go on with life.

Both of those decisions are now up on appeal by the United States Trustee to the District of Delaware, and it will be interesting to see whether KERPs are really dead or we have simply engaged in a new contest of semantics. Likewise, we have seen other changes in the commercial side. One of the big problems was 1102(b)(3),¹² another wonderfully drafted statute that requires creditors' committees and their counsel to, A, provide information to the creditors and, B, sub-

11. 11 U.S.C. § 503(b)(6) (2005).

12. 11 U.S.C. § 1102(b)(3) (2005).

ject to the court order, provide additional information, whatever that meant.

We are seeing in most of the big cases, starting with *Dana* in the Southern District of New York, orders being entered now by the bankruptcy courts saying that committees may enter into confidentiality agreements with the debtor, and that confidential information, regardless of what the statute says, does not have to be distributed willy nilly to the creditor body. And so far I have not seen any examples of a creditor's committee not only providing information, but the other part of the statute requires them to solicit creditor input. And so far I have seen precious little, other than from the Labor Unions.

There are quite a few other changes on the commercial side, and it's going to have a profound impact on what we do. Single asset real estate cases. Remember, prior to 1994 there were a lot of circuits who said that a single asset real estate case filed on the eve of foreclosure was, *per se*, bad faith, and it was going to be tossed. Congress unwittingly sanctified them in the '94 amendments and defined and said they were okay, and if the assets were less than \$4 million, then you had to resume payments.

Of course, that was a windfall for the big commercial single asset real estate cases because it meant their cases were sanctified, and by negative implication they didn't have to provide the kind of protection the little guys had to. That has been corrected in this Code. And now in drafting this, they resolved two ambiguities that existed in the statute. One is that rents may be used to pay the secured creditor and, number two, despite the holding of courts such as in the 7th Circuit, the interest you have to pay them is the non-penalty or non-default rate of interest.

We also see another interesting one which comes up every day. In fact, I have a case which I won't tell poor Judge Schmetterer. Section 549¹³ used to provide that you could avoid a post petition transfer, unless it was a sale of real estate, and the buyer didn't have notice of the bankruptcy, and the petition wasn't recorded.

There was a line of cases that, basically, said that artful debtors — and I had a couple of cases that put mortgages on their property post petition — could be avoided under a 549.¹⁴ Congress amended that to provide that a transfer of any interest in real estate is immune from avoidance if the petition wasn't recorded, and they didn't know about the bankruptcy.

13. 11 U.S.C. § 549 (2005).

14. *Id.*

And I think one of the issues that is going to come up very shortly is a debtor files a case, and he has a ton of real estate and doesn't bother to record the petition, or perhaps the Trustee finds out about the case, and he doesn't record the petition. We get \$60 a case, and recording the petition is only \$50. What is going to be the liability on the people in this room if they file a case and don't record the petition or they are the Trustee of a case and don't record a petition? This is an unanticipated consequence of what they have done.

The two big things we won't know for awhile, and that is exclusivity — ask yourself whether United Airlines could have been reorganized in 18 months. It will be until next Thanksgiving before we see cases starting to hit the 18-month wall, and the case that we will all probably want to look at is Dana, which is a mega case that was filed during BAPCRAPA.¹⁵ And, finally, we will get to see very shortly what happens to real estate cases where the debtor is compelled to assume or reject the lease.

The “To Christmas Rule” that Jack Butler made so famous is now dead. Under the rules in the new Section 365,¹⁶ the debtor has a maximum of 210 days. So if he files in January, he doesn't get Christmas. The other, more interesting drafting in this, Judge, is that if you assume the lease prematurely because you had to, and then reject it post petition, the landlord gets a two-year administrative claim and, yet, there is nothing in the statute that tells us whether the landlord had any duty to mitigate or not, is the two years liquidated damages or is there still, as there is in Illinois common law, an implied duty to mitigate? These are some of the surprises that Congress has put in our Christmas stocking with respect to commercial cases.

AUDIENCE MEMBER: What was that last section you mentioned, about the —

MR. PETERSON: Capping the claim? Look at 503 Bravo 7.¹⁷ Yes, ma'am.

AUDIENCE MEMBER: With respect to your comment that you haven't seen creditors' committees soliciting information from creditors; in fact, that is happening. They are filing notices with the Court that indicate that they are serving notice on all the creditors — setting up web sites and also soliciting information providing that counsel's name for the creditor's committee and stating simply that if anybody has anything they want to say, either put it on this web site or contact

15. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

16. 11 U.S.C. § 365 (2005).

17. 11 U.S.C. § 502(b)(7) (2005).

BAPs. And it may not be the best, but I am not exactly sure, since there are no real notice provisions in there, what more at this point in time can be expected.

I am sure, maybe, we will get some clarity about that as life goes on. But I am, in fact, seeing cases in which that's happening by committees.

MR. HOCHHEISER: You know, one of the things, I think, when you are looking at your Chapter 11 issues; time is going to be everything. I mean, 210 days on the leases, the exclusivity periods and — you know, we are sitting here today. It's April. You know, we come back next year, that's when we are really going to see how some of these big issues play out.

The other thing I just want to add on the commercial side is a change in the preferences. You know, technically preferences, trustees, debtor in possession, \$600, and your business cases now under the new law or the new Act, you are looking at \$5,000, and that's a big change.

I mean, there are a lot of Chapter 7 Trustees, not in your big 11 cases, but just in your smaller, you know — maybe your d/b/a type business cases. Basically, we are going after small preferences that may have been out there, and that's going to be one source of income for Trustees who only make \$60 a case. They may lose that one as well.

MR. PETERSON: Do you think there's going to be even a more profound change, in that the affirmative defense under 547(c)(2),¹⁸ they took out the word "and" and inserted the word "or," and so all they have to establish was either normal industry terms or it was in the ordinary course of my business? Do you think that's going to have a profound effect or do you think artful judges, trying to help out debtors, are going to raise the bar on what you have to prove to establish either one of those defenses?

MR. HOCHHEISER: Well, from a creditor's standpoint — I am in the business of representing creditors only — of course, we love that change there because everything is, basically, in the ordinary course of business of what the creditor does. How are judges going to react? Again, I don't know. There has not been any or a lot of preference litigation at this point in time, and that's something that's going to play out.

And, again, with trustees or debtor in possession of bringing these actions, they are going to be reluctant. There's going to be a lot of

18. 11 U.S.C. 547(c)(2) (2005).

money, potentially, spent or a lot of time in proceeding with these actions. And if — the defenses that can be raised now because it has been expanded, in my eyes and in the creditors' eyes, you may not see these preference actions getting filed because there may be no recovery because of defenses that could be out there.

AUDIENCE MEMBER: We certainly appreciate hearing Judge Schmetterer's conclusion about the change in the law, and I think we here appreciate working for attorneys that we have had over the years. But at this point, we are not sure if we are DRAs or not. But presuming that we are not, and the attorneys are the DRAs, as I understand, they are going to file petitions with the Court for the Courts to hear these things.

The petition has to include what stuff is worth. And in order to do that, the attorney or the client that he may have is not competent, apparently, to provide that information, so it's left up to somebody. And let's presume that we are competent to do that. As appraisers, we still don't have direction as to, what is market? What is market value?

Is the market on a typical market that, say you go out and buy a house, let's say, on the north side of Chicago. You would do that under some circumstances. But let's say the market changed and everything got foreclosed on. Those people that would buy those homes are different than the ones that would buy the other homes. You see where the confusion is going? Are we looking at liquidation values? Do we have to define market? Do we have a virginal market where everybody goes out and buys?

The problem is that DRAs are going to have a problem putting those values in if they are not provided. We don't know how to provide it.

MR. PETERSON: I am not sure how much of a problem that is in the urban areas. There's at least three web sites I can go to in the comfort of my office and price out your home. And the data may be only, you know, 12 months old; it may be less than 12 months old. I can go to Kelley Blue Book or the NDAA and get a wholesale or retail or trade-in value on your car. And if you own a set of baseball cards of the 1959 White Sox, I bet I can go to e-Bay and find out what those are trading for.

So I think the problem, though, is that there's so much in the Code that talks about retail value. And if you are trying to value for reaffirmation purposes or redemption purposes the value of a used Sears weed wacker, that's going to be much more problematic. But the bread and butter consumer cases are going to be houses and cars.

MR. BRUSTEIN: I had a case where the debtor had a lot of things; nice things, but not auction — not Christie's, Sotheby's things, and I was in the quandary this gentleman was talking about. What am I going to do?

I suggested to her that she go to a contents appraiser who I knew of, who was capable of doing everything from what you would buy at an ordinary art gallery down to what's in your basement. It cost her about \$1500 to get it. It's quite detailed; got a booklet that thick. But I didn't know what else to do. It's an imposition on the debtor, but we couldn't go in guessing, as this gentleman said. And so, fortunately, my debtor had \$1500 to pay for that.

MR. PETERSON: I think, on the other hand, as a Trustee, if somebody comes in and says, "Here is the Kelley Blue Book on the car, and here is an opinion of value from my friendly local neighborhood realtor for 50 bucks," and somebody comes in and says, "I looked at this on E-Bay," it may not be perfect, but I am not going to seek sanctions or object to a discharge.

MR. BRUSTEIN: If I knew you would be assigned as the Trustee, maybe —

MR. PETERSON: This is known as the Liebowitz factor, by the way.

AUDIENCE MEMBER: In Indiana we can't do that. That's against the law for us to do that. And if the attorney is representing the person that's going to be bankrupt, he has to have the person's interest in mind. And if the property is to be valued at a liquidation value, combine that with their exemption — let's say you have a married couple and you combine it, they may be able to reaffirm on the mortgage. I don't know. I may be valuing a factory.

MR. HOCHHEISER: If we look at the cases that were out there and we talk about valuation, replacement value, the Supreme Court came back and said replacement value on cars, okay. Now when you are looking at the new Act and the new legislation, and when the issue as to valuation comes up, it's two areas.

In redemption of personal property, they talk again about this replacement value. And when you are looking at vehicles in a Chapter 13 that are under the 910 Rule,¹⁹ they are talking full value of your claim. So in my view, when you are talking about personal property, I think it's pretty clear that we may be looking at a replacement value, okay.

19. 11 U.S.C. § 910 (2005).

AUDIENCE MEMBER: The problem again, what is replacement - wholesale or retail?

MR. HOCHHEISER: Going back to the Supreme Court case, replacement value is sort of retail plus or minus a little bit, and it's not clear. And that was the Supreme Court's decisions and even though we had a very lovely luncheon speaker, and I thought it was great talking about her experience at the Supreme Court, but sometimes their opinions in bankruptcy cases aren't very clear, and we did not get that much guidance.

We were given, "Here is your target. Here is where you start." And which way do you go? Same thing with interest rates. So it's still a bit of a gray area out there. I don't think you start with a liquidation rate, though. That would be, at least, the opinion that I have. I don't know if the judge has any thoughts or —

AUDIENCE MEMBER: Trustees are paid so gloriously, we hire an MIA, an AIA, and appraisers on all real estate and get full appraisals on all personal property, bringing in whoever the companies are that sell jewelry, and spend \$8,000 to \$10,000 per appraisal to get our 60 bucks. So I don't think you have to worry about the Trustee's appraisal of property. It's got to be can't-as-catch-can on the basis that makes any sense at all.

MR. HOCHHEISER: I agree with you. One of the things that we do on a creditor end — we are aggressive; aggressive to the extent that if we can help a Trustee bring money into the estate, that's going to benefit our clients. And we are going to try to provide that information, saying, you know, you really need to look at this because we have found out pre-bankruptcy there may be assets here that are recoverable; not that they weren't mislisted, okay, in a petition.

And I will tell a quick story. I had a case, it was actually in Chapter 13, where Debtors lived in a million dollar house. They were making about \$400,000 worth of income, and in their expenses that they listed in their schedule, there were \$200 a month for cleaning supplies. So we had an objection filed. I did a 2004(a) examination, and I asked the wife in the case, I said, "Why do you have \$200 a month for cleaning supplies?" She goes, "We have to clean the antique furniture."

I am looking at the value of the furniture. \$1500 is listed in the petition. And that's what they told the attorney, you know. And we can go into all the issues that were raised in the Panel before. But all of a sudden that case went from a 15 percent plan to an 80 percent plan because of the value of that asset. And the Trustee would never have caught it, even though they were a Chapter 13 Trustee.

There are opportunities that come up where information just gets obtained. The creditors and the trustees need to work together to try to bring money into the estate.

MR. PETERSON: Still, the best source is the ex-wife. Lou?

AUDIENCE MEMBER: Somebody mentioned that the effect of the new statute on business cases has been understated. I think that's true.

One of the things that concerns me, and I would like to hear some enlightenment from the Panel, is how does a lawyer protect himself or herself against liability under the provisions that now make an attorney for a debtor a virtual guarantor of the values and of the statements of the assets and liabilities and omissions of assets and liabilities in a business case?

If the company is big enough to have a certified audit, I assume you can rely on it. But for the middle sized company, how do you do it? Do you have to repeat an audit? Do you have to hire an auditor yourself? How do you protect yourself?

MR. PETERSON: We are a bunch of cowards.

HONORABLE JACK B. SCHMETTERER: How have you done it in your business cases? I mean, did you just take any number your client gave you without question or did you question?

AUDIENCE MEMBER: Of course, you question.

HONORABLE JACK B. SCHMETTERER: How did you question?

AUDIENCE MEMBER: Up until October 17, we had a Rule 9011,²⁰ which is very strict. But the one exception to Rule 9011 always was that a lawyer is not responsible for — and does not certify that he has a reasonable — he is reasonably satisfied with the assets that the debtor lists or the valuations he puts on them.

HONORABLE JACK B. SCHMETTERER: Why shouldn't you be reasonably satisfied that the numbers that your client is giving you have some basis?

AUDIENCE MEMBER: Because that's not a lawyer's job.

HONORABLE JACK B. SCHMETTERER: It is under the statute.

AUDIENCE MEMBER: It is under the new statute.

MR. PETERSON: Lou, I think the only way you deal with this problem; you can't be an absolute guarantor. At least in this jurisdiction, there's not a lot of 9011²¹ litigation. I know there is in Florida.

20. F.R.B.P. 9011.

21. *Id.*

Number three, I think what we are required to do as debtors and professionals is to establish best business practices, to at least come through with some type of verification. Maybe we ask to see the certified audits. Maybe we get the local realtor to do what we used to call windshield appraisal. Maybe we have one of the local auctioneers take a spin through there and tell us what the M&E and the inventory is worth.

But I think whatever we do — or we simply go on the internet and we check, you know — there's amazing things I could find about you on that internet — and we just do that kind of a verification. But I think, Lou, we are going to have — it would be interesting — we are going to have to adopt best business practices.

MR. BRUSTEIN: Is that another way of saying the cost to the client has gone up because the due diligence has to be paid for before the schedules get filed?

MR. PETERSON: That may be, I think — I like Lou's point — may be more dramatic for the business case than for the consumer case, because I think best business practices for the consumer case is a stroll down the internet. And that may take an extra 15 minutes to 30 minutes, depending on what the consumer has.

AUDIENCE MEMBER: I tend to disagree with Lou about one thing. I think under the old rules, you had a responsibility as an attorney to investigate the value of your debtor's assets; maybe not go to their property, but to certainly ask them questions. And if someone showed me \$200 worth of cleaning supplies, I would probably ask the same question; "Why do you need \$200?"

And to be told to put down in my schedules that they are worth \$1500 when they are worth more — I always ask my clients what's the most expensive item they have in their house, and do they have any antiques. And the answer is most always no. But you do have, under the other rule, some obligation to reasonably be satisfied.

MR. HOCHHEISER: I am going to add one thing to that; one of the things that we are seeing — to throw this back to the consumer side right now — is on reaffirmation agreements. And under the new reaffirmation agreement process, which has become very much more cumbersome on all sides, for the debtor, debtor's attorney, as well as creditors, a lot more debtors' counsel out there will not sign the declaration of counsel on these.

And it goes back to, at least my feeling, you still had your declaration of counsel under the old reaffirmation agreement. You still had

9011²² out there. The point that you bring up; what's the difference now that these debtors' counsel are saying, "I don't want to sign it? I am at more risk if the reaffirmation doesn't get approved."

The judge indicated in his opening comments, talking about, well, they find out reaffirmation agreements go before the Court if there's not enough income that's listed in, you know, the I and J schedules or that information that goes on the reaffirmation, and that's how they get it brought to the Court. But every reaffirmation agreement is potentially, pre-legislation, post-legislation, subject to Court review. And, you know, just — I am throwing this out to anybody if they have any thoughts — what's the difference today than was on October 16 when you signed the reaffirmation agreement?

MR. PETERSON: Under BAPCRAPA,²³ attorneys have been targeted. Pre-BAPCRAPA, we were not.

Let me ask you this question: One of the goals of Congress in passing this every-word-is-perfect statute, was to remove any doubt that the ride-through was dead. And did they succeed or are we going to see more ride-throughs than we ever imagined?

MR. BRUSTEIN: As a practical matter, you are going to see the ride-throughs, and we will have to see what the experience is.

You know, there's literature out there about, you know, can a creditor legally enforce an obligation where there has been an attempted ride-through after the case closes? But I haven't seen any of that in state court litigation or — where the creditor really tries to do a replevin, or something, in an attempt to drive through.

MR. HOCHHEISER: The bottom line out there is most creditors they want to get paid. They are not in the business of selling cars. They are not in the business of foreclosing on houses. All that takes time. And they are not going to, you know, reap the benefits that they have.

There are certain situations, based upon past history of debtors out there, where they are going to say, "No, we are not going to take the ride-through because your history shows every other month you end up then going behind 30 days, and it's a whole catch-up type situation. And they are not going to run the risk — they are better off because of, maybe the value, to take the car, take the house, sell it now and take their losses. But in most situations —

22. *Id.*

23. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

MR. BRUSTEIN: Alan, in my experience where that has happened, my client has just given back the property because the reaffirmation won't work. The ride-through won't work. We are out of options. Take it. I haven't seen it go beyond that.

MR. HOCHHEISER: And there hasn't been, at least since the new legislation, a lot of replevins happening out there where debtors have not been re-affing.

The other part of it is that you don't know at times until right up to discharge whether a reaffirmation agreement is going to get approved or not, so creditors are actually coming in, maybe filing a motion for relief from stay. But the other part that comes out there — and I know you talk a little bit about 521²⁴ in your statement of intent and failure to state your intent within 30 days or comply with it within 45 days after the first meeting. It has that automatic relief provision in there, and abandonment provision as well.

MR. PETERSON: That's very dangerous if you have a debtor who has a lot of equity in his house, he has a side deal with a secured creditor. He will purposely not reaffirm or if he does reaffirm, he will default immediately. He holds hands with the secured lender. The property falls out of the estate. The debtor gets his house back. The equity that would have paid unsecured creditors went poof in the night.

MR. BRUSTEIN: Well, Ron, that leads me to a question. Under 521,²⁵ I think it's 521, that applies to automatic dismissals. Subsection 3 or 4 says, "But if a trustee comes in."²⁶ It seems, to me, it puts an awful lot of pressure on the Trustee to react within a very short time frame to determine, this is an asset case, and I better watch out for this.

MR. PETERSON: Worse than that, I have to call the secured creditor and say, "Is the owner paying?"

MR. BRUSTEIN: Have you actually had to confront that issue yet in your month of new cases?

MR. PETERSON: No, but I am waiting.

MR. HOCHHEISER: The one advantage, at least in Ohio, is the foreclosure process is so slow, plus, most of the courts, at least in the Northern District of Ohio, the state courts that are in there, even though the Code says there's no stay if they don't comply, it never

24. 11 U.S.C. § 521 (2005).

25. *Id.*

26. 11 U.S.C. 521(i)(4) (2005),

became property of the estate, the abandonment is not there, they want to see an order.²⁷

Until they have an order signed by a judge that basically says relief is granted, the Trustee has abandoned his or her interest, they are not going to let that foreclosure go forward.

MR. BRUSTEIN: Are you talking now about a 362(j)²⁸ type order of a confirmation that the stay —

MR. PETERSON: It's all over the place. It's in reaffirmation. If you don't reaffirm, the property reverts back to the secured creditor, or he can get his replevin.²⁹ It's an automatic dismissal if he doesn't file his tax returns.³⁰

HONORABLE JACK B. SCHMETTERER: What does automatic dismissal mean?

MR. PETERSON: I was going to ask you that.

HONORABLE JACK B. SCHMETTERER: Automatic dismissal means that if I sign the order, it's automatically dismissed. In Chicago, all our colleagues agree that there's no case dismissed by the clerk; it's dismissed only by court order.

Now, what the statute does is it gives grounds for dismissal. And the word "Automatic" means if the grounds are found, the case should be dismissed. But there's still room sometimes to object to the grounds or to question the grounds. And we do not recognize any dismissal unless the Court has signed the order. And if there were another rule adopted by some higher misled court, that would mean, of course, that you have terrible uncertainty as to when the automatic stay expired, when various rights disappeared. And this is the only interpretation that makes sense and carries out the intent of Congress, that when certain things are demonstrated, that the case should be dismissed.

MR. BRUSTEIN: I passed out some citation references. There's the Bowsen case that goes into the issue the judge was just speaking of, where the question arose — the judge found he had to — the cases were automatically dismissed.³¹ It was a consolidation of four or five individual debtor cases where the payment advices just weren't paid on time; some for good reason, some for no reason.

The judge found that, clearly, the cases had been automatically dismissed. I don't know that it came down in all squares as to at what

27. 11 U.S.C. § 554(d) (2005).

28. 11 U.S.C. § 362(j) (2005).

29. 11 U.S.C. § 521(a)(6)(B) (2005).

30. 11 U.S.C. § 521(f)(1) (2005).

31. Cannot find citation. Does anyone have the citation sheet he referred to?

moment it was automatically dismissed. The judge seemed to indicate in his reasoning it was the 46th day, even though the order was entered beyond the 46th day. And, you know, you can look at that decision. It's listed on that material. It creates nightmares for when appeal rights rise and the like. But it was the only case I saw that really tried to address those points in some type of analytical way.

MR. HOCHHEISER: The other thing that plays in with that is when you are talking about the date that the order goes on versus, you know, did the case dismiss on the 46th day, you know, are you looking at does that annul the stay, you know, case is dismissed? Did the stay expire on the 46th day even though we didn't let everybody know until day 72 because, whatever reason?

The other issue is dealing with violations of the stay, because you are going to have a debtor's attorney who is going to come in and file a case, file a motion for contempt, for sanctions, basically saying the creditor did this on day 52, and it violated the stay. The creditor is going to come back and say, "But on day 46 the stay didn't exist because the case was dismissed." But you didn't have an order. And I agree; the Court speaks through its orders. It doesn't speak through the clerk.

MR. BRUSTEIN: You have the analogous situation in 363(c)(3) and (4) where the stay either may not — may terminate 31 days later or it may never have gone in in the first place.³² But the problem goes back to, it's difficult to know exactly if a case falls within 363(c)(3) or 4.³³ You can guess wrong either way. And it's also difficult to know whether — when the stay terminates, what is it terminating — with respect to what is it terminating? Because the statute talks about the stay terminates against actions against the debtor.

So I foresee — conservative lawyers may say, "You know what, it's very difficult." And I have been in this already — in the limited number of cases I have filed, I have already had this 363³⁴ issue come up, thinking, you know what, I really have nothing to worry about. There is no pending action that needs to be extended. So it doesn't really apply to me, but I can't take the chance of not going in.

But what if I took the other one and said it doesn't apply to me, and then the creditor goes in under 362(j)³⁵ and says, "I want an order

32. 11 U.S.C. § 363(c)(3)-(4) (2005).

33. *Id.*

34. *Id.*

35. 11 U.S.C. § 362(j) (2005).

saying the stay has terminated.” That, I think, leads to litigation over whether 363(c)(3)³⁶ ever applied in the first place.

MR. HOCHHEISER: There’s been a lot — I don’t want to say “a lot,” because there’s nothing a lot that has come out this statute so far. But there have been cases on — North Carolina is a hot district on this,³⁷ and also Arkansas, who have come down and said, “On your 30 days, okay, on day 31, sure, the stay is removed as to the debtor, but not to property of the estate.”³⁸

MR. BRUSTEIN: Right. Those two cases that Alan was referring to are listed on my materials. They are very interesting to look at if you practice in the area of Chapter 13, given the broader definition of property of the estate in 13 than in 7.

What is the real effect of the automatic termination under (c)(3)³⁹?

AUDIENCE MEMBER: I think many of the comments that are made prove Ron’s point that there hasn’t been as much change in the consumer area as it appears. There’s certainly a lot of room for creditor education in terms of motor vehicles. You don’t have Option 4 anymore. You have to redeem, surrender or reaffirm or there’s no stay. And there’s been creditors who have said, “Well, fine, then I will go pick up the car.” That’s not the answer. Then you are kicked back to state law. If they are not in default, you still may not be able to pick up the car.

MR. PETERSON: What we are looking for there — first of all, I am seeing in the Southern District of Illinois, people are — if they don’t feel comfortable — sometimes it’s a creditor who doesn’t feel comfortable reaffirming. They are going over to 13 where they never would have gone to 13 before. In the benches both in the Central District of Illinois and Southern District say, “We are going to confirm zero 13’s, thanks to Congress.” Some of the lawyers down there are saying, “Well, we use 13 as our involuntary reaffirmation agreement.”

But what we are seeing up here, I think, is three different types of consumer creditors. In bucket A are those creditors who if they don’t get their reaffirmation, they don’t care what the wreck is worth; they are going to put a hook on it. You have in bucket B a group of creditors who say, “I am not going to get involved in the class action bar. There’s too many disclosures I have to make in this reaffirmation sheet. If you keep sending me money, I am happy.” Then in bucket C

36. 11 U.S.C. § 363(c)(3) (2005).

37. Need citation from handout.

38. Need citation from handout.

39. 11 U.S.C. § 363(c)(3).

is a third group of creditors who never get involved at all. You keep sending them their check, and they are as happy as lambs.

What I am waiting for, though, and I think we are all waiting for in this room, is the first guy who comes forward, and he is sending the check in every month for nine months after his bankruptcy, and one day the secured creditor comes in and either tries to replevy the car or foreclose on the home, and the debtor is going to stand up and say, "Isn't there something called waiver and estoppel, and aren't you barred by those doctrines from yanking my home and yanking my car?" And that's where we are going to see whether the ride-through has more legs than we ever imagined.

MR. HOCHHEISER: I disagree. I am not looking forward to that day representing creditors.

HONORABLE JACK B. SCHMETTERER: We have not yet taken up the subject of exceptions.

MR. HOCHHEISER: We have a question.

AUDIENCE MEMBER: That brings up a question. It's a very good example. The creditor comes in and said, "I never got notice of your bankruptcy."

I would like to have the Panel address the really confusing situation with regard to what constitutes notice to the creditor. It used to be if the U.S. Trustee's Office sent out notices to the addresses that they knew about, the creditor was notified. Under the new statute, that's not necessarily true.

MR. PETERSON: The monkey is on the debtor's attorney's back to give notice to the creditor where the creditor in his last declaration told the debtor to send notice.⁴⁰ But I think in practice with — I mean, one of my observations is that Senator Grassley in enacting this bill wanted to put Geraci and the Mills out of business, and I think it's going to have the opposite impact.

This is going to become so complicated the guy in the suburbs is going to send all these files to the Mills, and the Mills are going to have systems where they know what the correct one is for MBNA. They know what the correct one is for Discover Card, and it's going to be real easy for the Mills to give correct notice.

HONORABLE JACK B. SCHMETTERER: These people can file at a location that is now published through the clerks' offices where they want to be served. And if they do that, then we have to serve them there.

40. 11 U.S.C. § 342(c)(2)(A) (2005).

There's also another thing that lawyers sometimes forget. If the creditor has filed an appearance and is in the bankruptcy, then notice should go to the lawyer who's filed an appearance. It is amazing the number of cases that they forget to do that.

AUDIENCE MEMBER: That poses a wonderful problem. The creditor is one thing. They can file where they want — the MBNAs of the world. But we have a multi-billion dollar debt buying market in this country, and a lot of those people that are buying debts are not registering where they want to be notified.

MR. PETERSON: Nor are they telling the debtor where to send the notices.

MR. HOCHHEISER: And to add to that problem on the debt buyers is they may be buying after a claim was filed, okay. They don't do an assignment of claim. So the notice goes back to the original creditor. And the problem is the agreements between the debt buyers and the original creditor to provide documentation may only be for X amount of time without getting charged for it. That's number one. And number two, the original creditor may no longer exist. They have no — so this mail is coming to an address that comes back, you know, unknown. And that has really been a huge problem.

AUDIENCE MEMBER: That's especially true with credit card companies. Because of their SEC accounting rules, they have to write that debt off in 180 days in order to show it as a loss on their balance sheet. They are turning around and selling those debts to debt buyers for two or three cents on the dollar, and that's where that huge market for debt buying is going on. And those can be all kinds of collection agencies. And so the person who comes in and files a bankruptcy says, "Well, you know, MBNA" — MBNA doesn't know where the heck this is.

MR. PETERSON: Whose problem is that if the creditor didn't comply with the statute by giving the proper notice to the debtor or publishing with the clerk, and the debtor has no idea that MBNA sold it to Sam? I think that's Sam's problem.

AUDIENCE MEMBER: Whose problem is it if he comes in —

MR. HOCHHEISER: That's going to be the creditor's problem in that case. You mentioned collection agencies buying, okay.

AUDIENCE MEMBER: It's your problem. You are going to end up with dozens of surplus cases on which you will not be paid compensation.

MR. PETERSON: It is amazing. Just as a sideline. I get these cases where I actually find assets; you know, I have a big PI suit or I

find equity in the home. I send out the surplus notice, and one guy files his claim. And I got to the point where I file claims for the creditors, they send me the checks back. I write them a letter back saying, "Please make this my donation to your Christmas party. Take the money, because I get a commission on it."

MR. HOCHHEISER: I get calls all the time representing creditors, and they say, "You represented this gas company back in 1985 when you started. Do you have any contacts there? Because I have all this money in a case. They are listed with a claim for, you know, \$2800," or whatever it is. And, basically, you know, "I want to get paid. I don't want the debtor to get the money back."

AUDIENCE MEMBER: There may be a simpler answer to notice provisions. My bankruptcy program allows me, I think, a \$40 fee to download the creditors' addresses from the credit reports. I advise my clients to use that feature to make sure that the addresses are correct.

MR. HOCHHEISER: That may be going to a lock box, which may not be good service, especially if you are talking about any adversarial or contested type matter; you know, not just listing, but in other things. It's a great start, because it's better than —

AUDIENCE MEMBER: Are you saying that we have to give notice to their last address, and if they put a different address than the credit report, it's their fault?

MR. PETERSON: I go back to what I tell my first year associates when they walk into my office on their first day of work; nobody ever screwed up a case by giving too much notice. If you have two or three conflicting addresses, send them to all three.

AUDIENCE MEMBER: I put five addresses.

AUDIENCE MEMBER: At least in the 6th Circuit, this is only an issue if it's an asset case. If it's a no asset case, it doesn't matter.

MR. PETERSON: If it's a no asset case, it may very well matter because if they didn't get proper notice, they may not get hurt on a sanctions and violations of the stay.

AUDIENCE MEMBER: The 6th Circuit law, as I understand it, is if it's a no asset case, your debt is discharged.

MR. PETERSON: That's a discharge issue. But there's another provision in this BAPCRAPA which the 6th Circuit may not address yet, that simply talks about whether a creditor who didn't get the proper notice can be sanctioned for a stay violation.⁴¹

41. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 342(g)(2)).

MR. HOCHHEISER: It cannot be a willful, malicious act if they did not receive the proper notice. You still need to put the debtor back into the position where you were when you violated the stay, but you will not be sanctioned, as Ron indicated, and that's under the new law. We haven't seen any cases come out —

MR. PETERSON: I want to cover three more topics, because we are almost at the end. Judge Schmetterer, you intrigued me with something you said earlier. When someone comes before you on an automatic dismissal, and the debtor shows up in sack cloth, claiming that she developed Lyme disease, was kidnapped on the way to the courthouse, and was caught in Hurricane Katrina, and could she please have an extra ten days, does automatic dismissal mean automatic dismissal?

HONORABLE JACK B. SCHMETTERER: There's no dismissal until a judge signs it. And I suggested also there might be some defense to the basis for the so called automatic dismissal, which I will not pass on today.

However, I wanted to myself touch on two points. One is the exemption. The new exemption law is very intriguing; the extra-territorial possibility of exemption application. And I am sure Ron can add to any of my observations. You read the statutes, and you find out that what exemption may apply may depend on how long you have lived in the district before filing, and then it might be a prior district where you have lived longer where the exemption might apply.⁴²

And then having gone through that analysis, you then have to look up the law of the state that you think the exemption applies and, if it's not the state where your client is living, whether or not that state law allows for extra-territorial; that is to say to apply to somebody who's moved out of the state. Some states don't apply their exemption to that.

You may end up under that analysis with no exemption, except, of course, that the statute provides that if there's no exemption otherwise, then the federal exemptions apply.⁴³ So — that's one of the reasons why in the checklist that you got with the prior Panel, they put on the question of checking up on what exemption might apply in the state law and under which it might apply.

Do you have anything to add?

42. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 522(b)(3)(A) (2005)).

43. 11 U.S.C. § 522(b)(2) (2005).

MR. PETERSON: We don't get a lot of exemption litigation here, Judge, but I am waiting for it. And the other frustration I have is that the Illinois legislature, which has three redeeming qualities — it meets in ignorance, it deliberates or adjourns in disgrace, and deliberates in corruption — has doubled Illinois' exemptions. And things that we might have thought about loosely prior to January 6, may be the Illinois legislature's revenge on BAPCRAPA,⁴⁴ because it has taken a lot of the states out of our reach, and we are not going to deal with it at all. But it also may at the same time make us much more sensitive as to whether they can get away with claiming an exemption.

HONORABLE JACK B. SCHMETTERER: One of the interesting aspects is that under the 7th Circuit ruling, the exemptions in place when the case was filed determine the exemptions in that bankruptcy, even though the state law may expand that later.⁴⁵

I hope we can take a few minutes to touch on a point regarding direct appeals. One of the creative possibilities for good lawyering and good judging, for that matter, is the possibility of direct appeals to a circuit. Prior to this law, there was no such possibility; at least our circuit did not recognize it, and I believe that was generally the rule throughout the country.

If you have some exceptional problem which is going to come up again and again, and just has to be decided, under standards of the statute, there must be first a certification at the trial court level, either by the bankruptcy judge who has the authority to certify only until the bankruptcy appeal has gone to the District, and after that point by the District Court. And then the second stage is that the Circuit must accept an immediate appeal.

The standards are in the statutes themselves, and the procedures for what you have to do in order to — and what should be in the certificate are in there, but you should be aware of it. It's not hard to follow the standards that have to be followed. But it probably, almost certainly, requires that once there is a certificate by a bankruptcy judge, there has to be somebody appealing.

One of the two judges that passed on this question of the meaning of the statute as to exemptions — you know, the rulings went two ways. One of the bankruptcy judges certified for immediate appeal on the grounds that this had to be decided out there in the circuit in

44. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

45. See *In re Owens*, 269 B.R. 794 (Bankr. N.D. Ill. 2001) (A debtor's exemption rights are determined as of the date the bankruptcy petition was filed).

which it resided. But nobody took an appeal, so all that work went for naught.

So when you see some issue that really ought to be taken up, the certification may be by the bankruptcy judge or the District judge when the District gets the case, or it may be by agreement of all the parties or it may be on motion by one of the parties. Great opportunities to try to get issues decided and bypass the — either the BAP level or the District level in order to get circuits to do that.

Of course, the circuit has to be persuaded that it's a great idea. And, even better, find some persuasive material to show them. They are not likely to do that very often.

MR. PETERSON: Let me move on to another topic. One of the other major improvements of the BAPCRAPA was credit counseling. Senator Sessions of Alabama walked through a credit counseling agency in Birmingham, saw the wonderful work that was done as these agencies took money from their clients and put together debt repayment plans, and so it was incorporated into the bill.⁴⁶

I guess the first question I want to ask you, Judge, is what happens when the debtor doesn't file the certificate of credit counseling with his petition? What becomes of his Chapter 7 now?

HONORABLE JACK B. SCHMETTERER: Well, I don't think I can give a universal answer, but I can tell you what's going on in our district. And the U.S. Trustee takes the view if they had the certificate in advance of filing but just didn't understand they had to file it, then the U.S. Trustee exercises prosecutorial discretion not to seek a dismissal.

I think the judges probably agree that that's the right outcome. But once they just don't have it, don't file it, it has to be dismissed.

MR. BRUSTEIN: Ron, I have had some experience with that. There's a debate where there's diversing opinions, there's the striking of cases, and there is the dismissing cases, and those are separated in the materials I have passed out.

When I brought this issue on two occasions, I was told — in each occasion it was Judge Doyle — this district made the right decision. The case had to be dismissed rather than stricken. There was no written opinion, but she had alluded to that it had been a matter that had been discussed and, pretty much, a consensus of the judges was that that was the right thing to do in this district.

46. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 109(h)(1)).

But as you will see on the citations, you will find other Courts that will look at the absence of this as a reason under 707⁴⁷ or 1307⁴⁸ or 1112⁴⁹ and say, “You know what, there is an opportunity here to achieve, you know, a better result. We will strike that petition rather than dismiss it.”

HONORABLE JACK B. SCHMETTERER: It had a consequence which I don’t know was fully understood. It meant that the stay was not in effect if they decided they struck — and there was no protection to the debtor during this gap — what you might call a gap period, if you call it a striking. And I suppose most of us in Chicago felt that this is not a jurisdictional requirement. If nobody raised the issue, this is a qualification.

There are many qualifications to be in bankruptcy, and if no one raises one of them, if the U.S. Trustee does not act, if the creditor does not act, the Trustee does not act, and there’s a discharge that is entered, what is that, an invalid discharge because there was a qualification that was not raised? This is just another qualification, and that, therefore, if it isn’t fulfilled and it’s raised, I think we have to dismiss, and we can’t talk about striking it. There’s no provision in the Code for striking.

MR. BRUSTEIN: Judge, that was the quandary I was in when my client had told me she had the certificate. She didn’t have it with her. She showed me her repayment plan. So she, obviously, had been, and we needed to get the stay of protection that —

HONORABLE JACK B. SCHMETTERER: The practice has been not to dismiss when parties have a certificate but just didn’t file it.

MR. BRUSTEIN: No. It turns out, when I called the counseling agency, because she couldn’t produce it a day or two later, what happened was she got a type of counseling that didn’t include that certificate, the kind under 109(h).⁵⁰

Now I was faced with your quandary. If I do nothing, who is going to make an issue? Maybe I will get a discharge. But can I really count on that happening? So eventually we brought it to the judge’s attention; “Dismiss this case for us. It should be dismissed anyway because we didn’t comply. We will re-file tomorrow with the certificate.”

But it does raise the issue because the U.S. Trustee wasn’t there. The case Trustee took no position. I informed them immediately,

47. 11 U.S.C. § 707 (2005).

48. 11 U.S.C. §1307 (2005).

49. 11 U.S.C. § 1112 (2005).

50. 11 U.S.C. § 109(h) (2005).

"Hey, this is what happened. What do you suggest I do? I don't know."

So it's — you know, you get those curve balls and — but it may not be that difficult of an issue in terms of planning for your cases because it turns out, even by telephone — I had an 80-year-old client who is intelligent but was very stubborn, claims no computer access, needed the case filed, was demanding, "The case must be filed." I was saying, "You can't file without a certificate. Here are the names and numbers. Get counseling."

This was at 11:00 in the morning. I was just about dictating the letter to him at 4:30 in the afternoon; "I am not filing the case even though you direct me to do so because — these are the consequences if you file without the certificate." 4:45, he faxes over the certificate. He got credit counseling. Very cantankerous, stubborn, elderly gentleman got a certificate over the telephone in the matter of an hour. It's an easy compliance.

MR. HOCHHEISER: Let me mention something about the whole credit counseling requirement. There are studies that have been done on the early cases filed. And of all the individuals that have gone to credit counseling, only about five percent of them nationally would ever be eligible for a credit counseling plan.

The other problem that arises — and I spoke on a panel with a gentleman from the Consumer Credit Counseling Association of Maryland and Delaware. These debtors come in for their counseling, okay, and they may have a shot of looking at alternatives to filing bankruptcy, but they have already given their bankruptcy attorney a retainer. And their big thing is, "Who is going to pay me back my 5, my 7, my \$1200 that I have already paid out? I am not interested in credit counseling. I have already made this commitment, and I am going to be in there."

You have seen that in a lot of cases, or at least that's what's coming up. So, yes, it's an easy requirement. You can go in. You are out of there in an hour. You pay your \$50, whatever it is, and you get your certificate. It wasn't the whole routine and what they were really looking for out of credit counseling, but that's the way it has played out.

HONORABLE JACK B. SCHMETTERER: This certificate we are talking about is a ticket of admission. There's also a ticket for exiting and getting the discharge, and that requires another form of counseling.

Actually, a good case can be made that this is a good requirement, because when people have been focused and received bankruptcy re-

lief, that's probably a good time in their lives to really get some counseling from a professional. And some of the organizations that are certified for that really have a lot of experience, but it's something that people should not forget to get for their clients.

If we get treated with a notice from our clerk that the deadline has passed, and there has been no certificate of that sort, we will close the case without entering a discharge, subject to the possibility that they wake up and bring in a certificate, and then we can reopen the case and the discharge.

MR. PETERSON: Judge, do you believe you have the statutory authority to waive credit counseling?

HONORABLE JACK B. SCHMETTERER: No.

MR. PETERSON: I notice there was a published decision by, of all people, our favorite aircraft carrier pilot Judge Crystal down in Southern District of Florida, who adopted the Creole exception which, basically, said that if you had a debtor who only spoke Creole, the U.S. Trustee had not certified any Creole credit counseling and, therefore⁵¹

—
HONORABLE JACK B. SCHMETTERER: That was not a waiver; that was a finding that there was nothing available.

MR. PETERSON: Isn't that the U.S. Trustee's finding and not a judge's finding?

MR. HOCHHEISER: There is a question.

AUDIENCE MEMBER: Is there anything that bars a potential debtor from disregarding the advice of the credit counselor? If the credit counselor says, "You shouldn't go into bankruptcy" —

MR. HOCHHEISER: They are paying for a service. They are going in there. They are paying their money. And even though they say, "You are better off in a plan," unless it's going to flush out through the means test, which they probably don't even qualify because they are not at the median income, no, there's no requirement on that.

MR. PETERSON: Think of this as traffic court, and you have been sent to see the movie.

AUDIENCE MEMBER: They are paying for a service that benefits the creditor that doesn't want the bankruptcy to proceed. That's the nature of the service. They are paying against their own interest.

And Abe said something I have to take offense to. By your example, I don't know why it had to be an 80-year-old man.

51. *In re Petit-Louis*, 338 B.R. 132 (Bankr. S.D. Fla. 2006).

MR. BRUSTEIN: Only to indicate he was not adept with computer technology.

MR. PETERSON: You are still describing Gene.

AUDIENCE MEMBER: That does not follow.

AUDIENCE MEMBER: In listening to all this, I can't help smiling, and I am smiling because I think to myself, after listening to months and months and maybe a couple years of description of inept draftsmanship and BAPCRAPA,⁵² and that sort of thing, maybe I can't subscribe to this comfort and notion that somebody screwed up and this is a sloppy, inaccurate, contradictory, duplicative, conflicting law.

Maybe this is a very artful law drafted by bankruptcy opponents to corrupt the system and discourage filing. And I think I prefer to think of it that way than the morass we are descending it to in an attempt to deal with what they foisted upon —

MR. PETERSON: That is the cynical view. One more?

AUDIENCE MEMBER: On the certificates, are those required in an involuntary situation?

MR. PETERSON: Great question because, as I read the statute, it doesn't distinguish.

AUDIENCE MEMBER: If you don't get a certificate, what happens to the involuntary proceeding?

MR. PETERSON: If you are a textualist like Justice Scalia, the case gets dismissed, and the guy's fraudulent conveyance holds up. But I have every confidence in Judge Schmetterer that he will find a way to hold that debtor in.

If we are all done, the Panel wants to thank you. You deserve a reception.

52. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.